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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Civil and political rights, including the questions of independence of the judiciary, administration of justice and impunity

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, submitted in accordance with resolution 5/1 of the Human Rights Council.

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Summary

The present report identifies the issues that have been of greatest concern to the Special Rapporteur during 2007 and since the issuance, early in the year, of his reports on activities undertaken during 2006, which were submitted to the Human Rights Council in June 2007. In this, his third report to the General Assembly, the Special Rapporteur lists the international conferences he has attended and the meetings held with various governmental and non-governmental stakeholders with the aim of planning future missions and following up past missions. The Special Rapporteur also reports on two missions he carried out in 2007, to Maldives and the Democratic Republic of the Congo, and records some of his principal recommendations.

The report offers a general panorama of the situations and circumstances that have the most impact on the independence of the judiciary, from the operational to the structural. It is based on an analysis of the Special Rapporteur's many involvements from 1994 to 2006. One of the conclusions he has reached is that the judicial actors in the majority of countries are unable to discharge their functions independently and — all too frequently — find that their own and their families' protection and safety are jeopardized. In this regard, he urges States to adopt specific measures to guarantee these persons' security and independence. He also urges the United Nations to attach priority to the defence of justice in its analysis of institutional matters and to give precedence to the justice sector in its support and technical cooperation activities.

The Special Rapporteur draws the attention of the General Assembly to the repeated violations of the right to a fair trial and other human rights which occur during states of emergency. In this respect, the Special Rapporteur informs the Assembly that the Human Rights Council received favourably his proposal that a seminar of experts should be arranged to study the impact of states of emergency on human rights. The seminar, to be held towards the end of 2007, will have as its objective the recommendation of appropriate solutions to the Human Rights Council, such as the adoption of a declaration stating the human rights principles that should be observed throughout a state of emergency.

Lastly, the Special Rapporteur analyses the situation with respect to international justice. He reviews developments at the International Criminal Court and the situation in Iraq, especially with respect to the Iraqi Supreme Criminal Tribunal, both of them issues covered in his earlier reports to the Human Rights Council and the General Assembly. He also continues his analysis of the activities of the Extraordinary Chambers in Cambodia.

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I. Introduction

1. This is the third report of the Special Rapporteur on the independence of judges and lawyers to the General Assembly. It describes his most recent activities, including his missions to Maldives and the Democratic Republic of the Congo. It also addresses various substantive issues: conditions influencing the administration of justice and the independence of judges, prosecutors and lawyers; states of emergency and their impact on the rule of law; and access to justice. Lastly, in the light of the most recent information available, it continues its review of developments at the International Criminal Court, the situation in Iraq, especially with regard to the Iraqi Supreme Criminal Tribunal, and the Extraordinary Chambers in Cambodia.

II. Activities of the Special Rapporteur

A. Activities to date

2. From 11 to 20 June 2007, in Geneva, the Special Rapporteur participated in the fourteenth annual meeting on the special procedures of the Human Rights Council and the fifth session of the Human Rights Council. At that session of the Council, the Special Rapporteur introduced the annual report, the report on communications sent to Governments and their replies, and reports on the missions undertaken to Maldives and the Democratic Republic of the Congo. In addition, the Special Rapporteur met with the representatives of various permanent missions to the United Nations in Geneva, in order to coordinate preparations for scheduled missions, and with representatives of governmental and non-governmental organizations and of various United Nations human rights bodies. He also gave a presentation on states of emergency and their impact on the observance of human rights; in it he emphasized the importance of organizing a seminar with a view to adopting a declaration on the subject. He participated as a speaker in two seminars: one on the right to the truth and the other on the Iraqi Supreme Criminal Tribunal.

3. On 28 and 29 June 2007, the Special Rapporteur participated in a meeting of the Supreme Courts of Justice of the Andean region organized by the Supreme Court of Ecuador, whose constitution and integration he had himself promoted in 2005, together with the United Nations and the Organization of American States, when the judges making up the Ecuadorian Court were dismissed in breach of the Constitution, giving rise to a serious institutional crisis. On that occasion, the Special Rapporteur addressed the issue of judicial independence and access to justice and referred to the international principles that govern judicial independence.

4. At the academic level, the Special Rapporteur gave a lecture on the future of international law at the Université de la Sorbonne Nouvelle, Paris, in May 2006, within the framework of the second conference of the European Society of International Law. In December 2006, the Special Rapporteur was invited by the American Society of International Law and the Harvard Law School to participate in a seminar on the topic "Transnational Judicial Dialogue: Strengthening Networks and Mechanisms for Judicial Consultation and Cooperation". On that occasion, he submitted a written paper entitled "Perspectives on Judicial Dialogue and Cooperation" (see http://www.harvardilj.org/online/107).

B. Future activities

5. The Special Rapporteur intends to undertake a mission to the Russian Federation at the end of 2007 or in the first half of 2008 and to Guatemala in the first half of 2008. He is also planning missions to Fiji, Cambodia and the Philippines and is hoping for early replies from the Governments so that these important missions can take place as soon as possible. He likewise looks forward to affirmative replies in response to his requests for visits sent to the Governments of Iran, Kenya, Nigeria, Sri Lanka, Tunisia, Turkmenistan and Uzbekistan, so that missions to these countries can be undertaken in the near future.

III. Missions

A. Mission to Maldives

6. From 25 February to 1 March 2007, the Special Rapporteur visited Maldives, at the invitation of its Government, in order to assist the latter with the implementation of a series of legal reforms within the framework of a comprehensive reform plan adopted by the President of the Republic in March 2006, especially with respect to constitutional and legal reforms aimed at establishing an independent judiciary and a system of real and effective separation of powers. In the course of his mission, the Special Rapporteur met with the President of the Republic, various ministers, judicial officials, representatives of the Maldivian legal community, members of non-governmental organizations and representatives of political parties, who briefed him on current issues relating to the functioning and independence of the judiciary in Maldives. The Special Rapporteur also interviewed detainees in the Maafushi prison.

7. The Special Rapporteur thanks the Government of Maldives for giving him the opportunity to analyse the state of the judiciary and review the current status and scope of the reforms aimed at bringing the judiciary into line with the international commitments assumed by Maldives, especially those under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which were recently ratified by Maldives. He values very highly the concern and interest shown by the Government in progressing rapidly towards this goal.

8. The report on the visit (A/HRC/4/25/Add.2) is intended to provide an overview of the judiciary in Maldives and the difficulties faced by the main actors in the administration of justice. The visit showed that the current state of the judiciary in Maldives needs urgent, in-depth reforms to enable the judiciary to meet the minimum international criteria for independence and efficiency in a democratic system. These goals can be attained through dialogue between the political forces in the country, with, if requested by the Government of Maldives, the support of technical and financial assistance from the international community.

9. Currently, the judiciary in Maldives is under the authority of the President of the Republic and therefore lacks the necessary independence to perform its basic role of administering fair and independent justice and safeguarding and protecting the exercise and enjoyment of human rights.

10. As to fulfilment of due process rights and guarantees, it is commonplace to find pretrial detention without appropriate judicial review, trials in which the

accused lacks legal representation, and criminal investigations handled solely by the police without the necessary judicial review by prosecutors or judges. This poses serious problems for due process rights and guarantees during the investigative phase. Among other findings, the Special Rapporteur noted a serious shortage of judges and lawyers in the greater part of Maldives as a consequence of, inter alia, the country's geographical configuration and lack of internal capacity to provide appropriate legal education and training — principally in the area of common law — for future legal professionals.

11. Concerning the prosecution services, the Special Rapporteur recommends the establishment of a post for a Prosecutor-General, who should be completely independent from the executive branch and should play a major role in police investigations.

12. The Special Rapporteur observed that some positive work on the codification of Maldivian legislation had been undertaken. In particular, a new Penal Code and a new Criminal Procedure Code were being prepared, with a view to harmonizing sharia law and common law.

13. Concerning the legal profession, the Special Rapporteur confirmed the serious shortage of lawyers in Maldives, in particular in the criminal justice system, which severely compromises the right to a defence. Also, the independence of lawyers is not guaranteed, as there is no bar association, and the Ministry of Justice deals with all disciplinary matters and is empowered to issue and withdraw licences to practise. The Special Rapporteur recommends that an autonomous bar association should be established in order to provide lawyers with the independence required for the exercise of their profession. It should be responsible, in particular, for creating a common examination governing access to the legal profession, for issuing and withdrawing licences, for guaranteeing minimum standards for the exercise of the legal profession, for deciding disciplinary matters and, in general, for the independent representation of the interests of the legal profession.

14. The Special Rapporteur noted with extreme concern the drastic increases in trafficking and consumption of drugs, which are having a major impact on the country. When visiting the Maafushi prison, he witnessed the punitive approach of the criminal justice system, which had the effect of criminalizing young drug users and imposing harsh prison sentences. In the absence of programmes of prevention and rehabilitation, offenders were not being reintegrated into society; rather, there were high levels of repeat offences. That fact demonstrated the failure of the current criminal justice system and the need to devise and implement prevention and rehabilitation programmes on an urgent basis.

15. There is definitely an urgent need for in-depth reforms in the Maldivian judicial system, in conformity with minimum international criteria for independence and efficiency in a democratic system. In this regard, the Special Rapporteur emphasizes and welcomes the Government's decision to embark on a sweeping constitutional and legislative reform aimed at, among other things, establishing a real and effective separation of powers, guaranteeing the independence of the judiciary and holding the country's first democratic elections in 2008.

16. The Special Rapporteur attaches the utmost importance to the early adoption of the draft Constitution that is under review by the Special Majlis (Constitutional Assembly). He regrets that the deadline of 31 May 2007 for the adoption of the new Constitution could not be met, the negotiations between the members of the Special Majlis having stalled owing to the interruption of talks between the representatives

of the principal political parties. However, the Special Rapporteur welcomes the fact that the Special Majlis reached an agreement on 11 June establishing that the constitutional reform will be adopted by 30 November 2007. In this respect, he urges the principal political actors and all the members of the Special Majlis to continue their work within the framework of a sustained and flexible exchange between the various actors, with a view to adopting the draft of the new Constitution prior to the new deadline. Observance of this deadline is essential, so that the other reforms contemplated in the Government's Road Map, which are of critical importance to the establishment of democracy in the country, can be implemented.

17. The Special Rapporteur is most gratified to note the appointment of the first women judges in the country's history, three women having been designated in July. Given that the appointment of women judges had been one of the most pressing recommendations in his report, the Special Rapporteur commends the Maldivian authorities for taking this significant step and encourages them to continue to implement effective measures in order to end gender discrimination in the judiciary.

18. In conclusion, the Special Rapporteur offers his support to all in the Government, the judiciary and civil society who are striving to achieve an independent, impartial, effective and transparent judicial system in Maldives. To this end, he urges the international community to provide to the Government of Maldives, at this key moment in the country's history, the kind and level of sustainable assistance that is indispensable for reaching the goals described and ensuring that the country succeeds in its transition to democracy. In particular, he urges the Office of the United Nations High Commissioner for Human Rights (UNHCHR) and the international organizations of jurists, such as the International Association of Judges, the International Bar Association and the International Commission of Jurists to offer the necessary collaboration.

B. Mission to the Democratic Republic of the Congo

19. The Special Rapporteur visited the Democratic Republic of the Congo from 15 to 21 April 2007 at the invitation of the Government. He and his assistant visited Kinshasa, Bukavu in Sud-Kivu, Goma in Nord-Kivu and Bunia in Ituri, where he met Government representatives, judges and prosecutors from both civilian and military courts, lawyers, members of NGOs, various representatives of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the principal donors to the justice sector. The Special Rapporteur would like to thank the Government for having allowed him to study at first hand the state of the judicial system in order to understand some of its weaknesses, which made it possible for him to make recommendations designed to facilitate its rehabilitation.

20. Having emerged from a decade of conflict and a three-year transition period, the country has, since 2006, had a democratically elected Government and an appropriate institutional framework. It must now establish an independent and effective judiciary, so that it can play its role as a pillar of democracy and guarantor of the rule of law by putting an end to the near universal impunity that currently prevails in the country.

21. The Special Rapporteur's final report, containing his conclusions and recommendations on his visit, will be presented to the Human Rights Council in a few months. The Special Rapporteur has, however, already submitted a preliminary note to the fifth session of the Council (A/HRC/4/25/Add.3). In that document, he

notes that the judicial system is in an alarming state, especially in view of the following:

(a) There are far too few judicial personnel and courts in the country. Judges do not have the logistical and physical facilities they need to perform their duties in a dignified and professional manner. The lack of adequate remuneration encourages a lack of independence and almost systematic corruption among judges and court officials;

(b) Interference by the executive authorities and the army remains very common. The lack of an independent higher council of the judiciary responsible for managing judges' careers makes judges more vulnerable to interference;

(c) Gaining access to justice is very difficult for the majority of the population because of corruption, a lack of financial resources, the geographical remoteness of the courts and transport problems and a lack of awareness of appeal mechanisms;

(d) In most cases, the courts' decisions are not enforced. The number of prison escapes is also high, owing in part to the badly dilapidated state of the prisons. This undermines the work of the judicial system and allows crime to go unpunished;

(e) Most human rights violations are committed by the armed forces and the police and fall within the jurisdiction of the military tribunals. International standards require that cases of human rights violations by members of the armed forces, like trials of civilians, should be heard by civilian, not military courts. The country must comply with these standards. This is all the more important because the lack of independence particularly affects the military judicial system, which remains dependent on the military hierarchy;

(f) Preventive detention is the rule rather than the exception. It is used in connection with far too many offences, and often the sole aim is to extract money in return for the release of the detainee. Suspects can often be held in preventive detention for months or even years without being found guilty by a court of law.

22. In view of those observations, the Special Rapporteur has made the following preliminary recommendations:

(a) The allocation of a considerably higher percentage of the national budget to the judicial system. The current allocation is less than 0.5 per cent of the budget, whereas the budget of the judicial system usually accounts for between 2 and 6 per cent of national budgets. These resources should, inter alia, make it possible to improve judges' pay, recruit new judges, give them the premises and operational capacity they need to perform their duties, and establish new courts, especially magistrates' courts;

(b) The development and implementation by the Justice Ministry, in close cooperation with donors, of a plan for rebuilding the judicial system. In this regard, the Special Rapporteur supports the work of the Joint Committee to Monitor the Justice Framework Programme in the Democratic Republic of the Congo. Convinced that this Committee's work is critical to strengthening the country's judicial system, but having noted delays in the drafting of the plan, he encourages Committee members to press on with their work so that the plan can be adopted as soon as possible;

(c) Recovery by the country's authorities of control over its natural resources, in order to allow the country to obtain the resources it needs to strengthen its institutions, in particular the judicial system, and to ensure that the population benefits from the country's considerable wealth;

(d) To give effect to the constitutional framework and ensure that judicial independence does not remain a dead letter, a number of laws must be adopted as a matter of urgency: (1) A law on the organization of the Higher Council of the Judiciary, a key body that will be responsible for appointing, promoting and disciplining judges and for drawing up the judicial system's budget; (2) A law providing for the application of the Rome Statute, which will transfer jurisdiction over international crimes from military tribunals to the civilian judicial system; (3) Laws establishing the Court of Cassation, the Constitutional Court and the *Conseil d'Etat*;

(e) The training of judges and auxiliary staff should be considerably strengthened. A college for the judiciary and a college for the professional training of judicial auxiliary staff should be established as soon as possible;

(f) In order to guarantee the right to a defence, a right recognized in the Constitution, the State should establish a system for paying duty lawyers, for example through bar associations, to ensure that poor people can have a high quality defence;

(g) The civilian justice system should be strengthened: it should have sole jurisdiction to judge civilians and cases of human rights violations committed by the armed forces or the police. The jurisdiction of the military tribunals should be gradually limited to offences of a purely military nature;

(h) The use of preventive detention must be strictly limited. A maximum period of preventive detention should be established by law, especially for offences for which the prison sentence is under five years;

(i) A system for monitoring the enforcement of judgements should be established, as should a mechanism to ensure that the legal costs incurred by poor people are met by the State;

(j) The Congolese judiciary and the international community should cooperate in prosecuting grave violations of human rights and humanitarian law committed during the war, drawing on the experience of judicial cooperation in the area of transitional justice that has produced good results in other countries. The establishment of joint benches might be an appropriate solution.

23. The Special Rapporteur welcomes the Government's recognition that the Congolese judicial system — the backbone of the rule of law and the country's development — is in a critical state and urgently needs to be strengthened. In this regard, the Special Rapporteur invites the new Government to make the reconstruction and strengthening of the judicial system a priority in its programme for the democratic consolidation of the country, and he encourages the Government to pursue its efforts to that end.

IV. Conditions influencing the administration of justice and the independence of judges, prosecutors and lawyers

24. In order to give an overview of the conditions and circumstances that influence, in particular, the independence of the judiciary, whether in organizational or operational terms, the Special Rapporteur conducted an assessment of the many activities he carried out between 1994 and 2006. As a result, he was able to identify the circumstances that most frequently influence the functioning of the judiciary and its independence. Those circumstances fall into three categories: (a) circumstances affecting the independence of judges, prosecutors, lawyers or court officials; (b) standards and practices affecting the rule of law and jeopardizing the smooth functioning of the judicial system and the right to a fair trial; and (c) various specific challenges to the judiciary and its independence. In that connection, the special Rapporteur's previous report to the Human Rights Council recommended that the Council should increase still further its efforts to defend the work being accomplished by different actors involved in the administration of justice and recommend that States adopt specific measures intended to guarantee the safety and protection of judicial employees.

A. Circumstances affecting the independence of judges, prosecutors, lawyers or court officials

25. Throughout the world, those who work in the judicial system are at risk or face situations that result in violations of their human rights. As the Special Rapporteur has noted in this (A/HRC/4/25/Add.1) and previous years' reports on communications issued to countries, those situations consist mainly of harassment, intimidation, vilification and threats, but may include enforced disappearances, assassinations or summary executions of judges, prosecutors or lawyers simply because they are doing their jobs. Cases recorded in 2006 show how regularly such circumstances arise: about 55 per cent of communications, relating to some 148 cases in 54 countries, dealt with violations of the human rights of judges, lawyers, prosecutors and court officials. Threats, intimidation and acts of aggression directed against lawyers accounted for 17 per cent of communications issued by the Special Rapporteur; the corresponding figure for judges and prosecutors was 4 per cent. Arbitrary detention and judicial harassment accounted for 26 per cent of communications concerning lawyers and 4 per cent of those concerning judges and prosecutors. Assassinations of lawyers, judges and prosecutors accounted for 4 per cent of the total number of communications. In some countries, the level of violence was especially high. For example, in one Latin American country, the Office of the Special Rapporteur recorded the assassination of 16 employees of the judicial system, 63 cases of threats, 2 abductions and 2 cases of exile between January 2005 and August 2006. In one Asian country, no fewer than 15 lawyers and 10 judges were assassinated with impunity between 2001 and mid-2006. The authorities do not always provide sufficient protection or a clear condemnation of these criminal activities, which often go unpunished.

B. Standards and practices affecting the rule of law and jeopardizing the smooth functioning of the judicial system

26. Institutional considerations can affect the functioning of the judiciary and its independence and can even jeopardize the rule of law. Corruption of the judiciary is one of the most difficult threats to eradicate. While high levels of corruption are often attributed to the poor remuneration of judges and lawyers and the judiciary's lack of financial independence, there are many contributing factors, and judges' ideological or political allegiances are particularly significant. Delays in the administration of justice are also as common as they are disturbing. Violations of the right to judgement without undue delay typically stem from the unnecessary complexity of judicial procedures combined with an excessive volume of cases reaching the highest courts.

27. The Special Rapporteur also noted with some alarm that reforms of the judiciary, instead of reinforcing judicial independence, often undermine it. In this regard, serious interference by the executive branch in the composition and functioning of the Supreme Court, as well as non-permanent judicial appointments and appointments within the direct gift of the Head of State, are recurrent themes in the complaints received. While the establishment of specialized jurisdictions is generally well regarded, such jurisdictions are frequently prey to particular political interests and do not always meet the requirements of due process. In some cases, the prosecutor's office and the executive are so closely identified that the role of lawyers and judges in the trial is reduced to a mere formality.

28. Unequal access to justice is another factor that affects many parts of society, especially the most vulnerable groups. These same groups also lose out on account of a failure to enforce court decisions, particularly where economic, social and cultural rights are at issue, which illustrates the relationship between key economic and social factors and the administration of justice. This issue will be discussed below and will be the subject of the Special Rapporteur's next report to the Council.

29. With regard to lawyers, there have been recurrent instances of non-existent, inadequate or disregarded safeguards on the freedom to practise their profession, as well as difficulties obtaining access to clients or documentation and inequality of arms throughout the case.

C. Specific challenges

30. Some of the most serious problems recorded, and those in respect of which the Special Rapporteur has received the most complaints, relate to the trial of civilians before military courts and the trial of members of the armed forces accused of serious human rights violations by their peers, and the establishment of special courts, which are generally associated with a serious violation of the principles of natural law. The list also includes a growing number of complaints received following the introduction of particular counter-terrorism, national security or asylum legislation, which has caused particular consternation because it restricts rights by precluding or limiting recourse to the justice system and according broad powers to the executive.

31. Other complaints referred to the adoption of amnesty laws, which prevented those who had authorized or perpetrated grave and systematic human rights violations from being brought to justice. The denial of habeas corpus or *amparo* in

cases of enforced disappearance is particularly significant. The death penalty has also been especially controversial. If a death sentence is handed down following a trial which did not comply with the relevant standards, there have been violations of both the right to a fair trial and the right not to be deprived of one's life arbitrarily.

32. Likewise, a significant number of complaints reflect the difficulties many States have in reconciling modern, positive law and religious, traditional and/or tribal law.

V. Protection of rights during states of emergency

33. All legal systems throughout the world provide for the adoption of emergency measures to deal with crisis situations. At present, a state of emergency may be declared only to maintain constitutional order and restore normality when organized community life is threatened. But whatever the declared intention and purpose, in practice states of emergency continue to give rise to serious human rights violations and often seriously constrain the administration of justice. One of the main challenges facing international human rights law has been to establish limits for such violations by specifying the legal scope of a state of emergency. The basic text is article 4 of the International Covenant on Civil and Political Rights, which lays down the formal and material requirements for implementing a state of emergency. This article has been the subject of extensive comments by the Human Rights Committee, particularly in its general comment No. 29.

34. While general comment No. 29 and the precedents established by the treaty and non-treaty bodies have enabled progress to be made in the legal regulation of states of emergency, there are still many cases in which improper conduct by States constitutes a violation of human rights, in particular as far as the right to a fair trial and the independence of the judiciary are concerned. With regard to the right to a fair trial, the principal violations are of the right of habeas corpus, the right to legal assistance of one's own choosing, the right to appeal before an independent court, the right to a public trial and the right to present one's own witnesses. Other frequent violations are the indiscriminate use of preventive detention, indefinite detention without charges or a trial, protracted incommunicado detention, obtaining confessions using torture, convictions based on such confessions and the violation of the principle of *non bis in idem*.

35. With regard to the independence of the judiciary, measures are adopted to prevent the judiciary from acting as a counterweight to the executive. Such measures include, for example: replacing ordinary courts by military courts or commissions; harassing judges, prosecutors and lawyers; removing judges or transferring them to places where they are unable to interfere with the executive; subordinating the judiciary to the executive; and discrediting or disregarding judicial decisions. New threats have justified new ways of suspending human rights, in breach of the obligations undertaken by States and in disregard of the principles governing states of emergency, such as those of proclamation, notification, exceptional threat, proportionality or state of emergency.[1] Use is frequently made of exceptional measures under ordinary circumstances. Restrictions are imposed — generally by means of laws on national security, anti-terrorism and immigration —

[1] See document E/CN.4/Sub.2/1997/19 and Add.1

that go far beyond the limitations and derogations allowed under ordinary circumstances.

36. Bearing in mind that states of emergency continue to give rise to serious human rights violations, the Special Rapporteur recommended to the Human Rights Council at its June 2007 session that an instrument should be drafted whose purpose was to incorporate in a single text — declaratory in nature — all norms and principles regulating the protection of human rights during states of emergency. To that end, the Special Rapporteur recommended to the Council that OHCHR should organize a seminar of experts to discuss the drafting of guidelines or other provisions to ensure the observance of human rights during states of emergency and to submit to the Council a proposal based on the results of its work.

37. The Special Rapporteur is gratified to note that the Council was favourable to this proposal. Many delegations recognized the importance of the issue, and some observed that in the past states of emergency had given rise to serious violations of human rights in their own countries. This demonstrates the importance of the seminar of experts, which will be organized by OHCHR and held towards the end of 2007, and the significance of its conclusions and proposals for the Council.

VI. Access to justice

38. The Special Rapporteur has addressed on many occasions, in particular in his reports on the countries he has visited, the lack of access to justice and its serious consequences for the full enjoyment of human rights. Appropriate and egalitarian access to justice is a basic condition for the effective implementation of human rights and is a serious problem in many countries. In its broadest sense, this concept involves not only access to the judicial system but also access to other procedures and institutions that assist individuals to claim their rights and deal with State bodies, including national human rights commissions, ombudsmen or mediation institutions.

39. Given the importance and scope of the issue of access to justice, the Special Rapporteur intends to address it extensively in his next general report to the Human Rights Council. In the present report to the General Assembly, he will briefly outline the various factors and circumstances impeding appropriate and egalitarian access to justice.

A. Lack of capacity and efficiency in the judiciary and other related institutions

40. The judicial systems of many countries are affected by a blatant lack of resources, which prevents them from discharging their functions efficiently. This is often reflected in: an inadequate number of courts to deal with the large number of cases awaiting trial, together with the fact that in many instances there are no mediation bodies to take some of the workload; and a lack of technical resources and suitably trained and remunerated personnel. Many countries do not have the means to guarantee the protection of the victims and witnesses of human rights violations, which makes it difficult for victims to gain access to justice. The Special Rapporteur was also concerned to find that in a number of countries justice systems were so centralized geographically that only the capital and large cities had courts, while huge rural areas remained outside the system. In this context, the relationship

between access to ordinary justice and access to indigenous or traditional justice systems is of particular interest to the Special Rapporteur. In addition, corruption in the judicial system has been reported as one of the factors impeding access to justice in many cases.

B. Absence of the necessary will to allow and facilitate access to justice

41. In other instances, the fault lies, not with a lack of institutional capacity, but with an absence of will on the part of Government authorities to provide appropriate and egalitarian access to justice, especially, as mentioned below, by the more vulnerable social groups. The excessive pressure of the executive on the judiciary means that access to justice is severely limited on many occasions. There are numerous cases in which a person's access to a defence counsel or judge is barred, and this is particularly frequent in situations of detention. The Working Group on Arbitrary Detention, the Special Rapporteur on torture, the Committee against Torture and the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union, among others, have reported numerous instances of this situation. In recent years the Special Rapporteur has noted with concern that military courts have extended their jurisdiction, which has proved an obstacle for many victims of human rights violations in their quest for justice; also, laws on amnesty present in many cases an insurmountable barrier to those seeking access to justice.

C. Dearth of economic resources and lack of information for individuals

42. The cost of a judicial process is frequently more than an individual can afford. This circumstance is of special concern in developing countries, which often lack the capacity to guarantee that an official defence counsel will be provided free of charge or to defray the legal costs for persons who cannot afford to pay themselves. Another major obstacle to effective access to justice is a lack of information and awareness on the part of individuals regarding entitlement to rights and guarantees and the procedures to follow.

D. Problems of access by vulnerable groups

43. Non-discrimination is a prerequisite when it comes to appropriate and egalitarian access to justice. Access must be guaranteed to all individuals, without any distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition. Yet, in practice, there are many groups which, because of specific vulnerabilities, have limited access to justice. This fact has been reported on numerous occasions by United Nations special rapporteurs, working groups and committees dealing with: persons in a situation of poverty; women and children; persons with a disability; asylum-seekers; immigrants; indigenous people; and groups discriminated against on the basis of their race or some other circumstance.

E. Special difficulties in an armed-conflict or a post-conflict situation

44. Limits to access to justice are greatest during armed-conflict and post-conflict situations. In many instances, an almost total paralysis of the judicial system occurs during conflicts, and individuals have no possibility of accessing justice. Often the judicial systems of countries in post-conflict situations have to contend with a shortage of personnel — generally speaking, because of illness, death or migration — and the total or partial destruction of municipal facilities. In periods of conflict and transition, justice has to deal not only with normal business but also with the numerous violations of human rights and international humanitarian law that tend to occur during a conflict. Victims, who have every right to expect truth, justice and reparation, turn to the judicial system; but in such contexts the courts are usually overwhelmed and lack the capacity to administer justice.

45. Given the complexity and magnitude of the problem of access to justice and its importance to the observance and enjoyment of all human rights, the Special Rapporteur intends to address this issue extensively in his next general report to the Human Rights Council. He wishes to prepare a full analysis and to make recommendations that will help to improve access to justice.

VII. International justice

A. International Criminal Court

46. As a judicial institution that complements national courts and does not exclude them, the International Criminal Court has the advantage of being able to undertake investigations and prosecute and try those chiefly responsible for war crimes, crimes against humanity and acts of genocide where the national authorities are incapable or unwilling to do so.

47. In recent years the Court has taken some major steps towards consolidating its establishment, including the entry into force of the Agreement on the Privileges and Immunities of the International Criminal Court, the setting up in The Hague of the secretariat of the Assembly of States Parties to the Rome Statute of the Court, and the signature of an agreement determining the legal basis of the cooperation between the Court and the United Nations.

48. The ratifications in September 2006 of the Rome Statute to the Court by the Governments of Chad and Montenegro are extremely encouraging. However, the signing of bilateral agreements on immunity between the United States and the States Parties to the Rome Statute of the Court in order to remove United States citizens from the jurisdiction of the Court is of concern to the Special Rapporteur.

49. With regard to his continued monitoring of developments at the Court, the Special Rapporteur welcomes the progress made in each of the investigations being carried out, which he deals with below.

1. Democratic Republic of the Congo

50. On 17 March 2006, Thomas Lubanga Dyilo of the Democratic Republic of the Congo, who is the leader and founder of the Union des patriotes congolais, was arrested and surrendered to the International Criminal Court because of the alleged commission of the following war crimes: (a) enlisting children under the age of 15;

(b) conscripting children under the age of 15; and (c) using children under the age of 15 to participate actively in hostilities.

51. On 29 January 2007, Pre-Trial Chamber I of the Court had sufficient evidence to confirm the charges presented by the Prosecutor and to proceed to trial. Accordingly, Mr. Lubanga's case is the first to come before the judges of the Court.

52. The Special Rapporteur singles out for mention the cooperation of the Democratic Republic of the Congo, the Security Council of the United Nations and the States Parties to the Rome Statute, without which the surrender of Mr. Lubanga and his appearance before the Court would not have been possible. He also regards as positive the decisions adopted by Chamber I which enabled the four victims to participate in the trial of Mr. Lubanga.

2. Darfur, Sudan

53. As emphasized by the Special Rapporteur in his previous reports, in March 2005 the Security Council referred the case of Darfur to the Prosecutor of the International Criminal Court, in conformity with article 13, paragraph (b), of the Statute. In June 2005, the Prosecutor formally initiated investigations into the crimes committed within the framework of the armed conflict between the Sudanese security forces and the Janjaweed militia against organized rebel groups, including the Sudanese Liberation Army and the Justice and Equality Movement.

54. As a result of this investigation, the Prosecutor considered that there were sufficient grounds for believing that Ahmad Muhammad Harun, formerly Minister of the Interior and currently Minister of Humanitarian Affairs of the Sudan, and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), leader of the Janjaweed militia, were criminally responsible for the commission of crimes against humanity and war crimes in Darfur in 2003 and 2004 and therefore requested Pre-Trial Chamber I to issue the necessary summonses.

55. In the light of the evidence referred by the Prosecutor, the Chamber concluded that there were sufficient grounds for considering that Ahmad Harun, by virtue of his position, not only was aware of the crimes committed against the civilian population and the methods used by the Janjaweed militia but also had probably encouraged the commission of such acts. It also concluded that there was sufficient evidence to consider that Ali Kushayb had recruited, established and armed the Janjaweed militia, deliberately contributing to the commission of crimes against the civilian population, and that he had participated personally in some of the attacks. The evidence collected also indicated that the two had probably acted together — and with others also involved — as part of a systematic and organized plan whose aim was to attack the civilian population in Darfur. Believing that the two men would not appear voluntarily before the Court, the Chamber decided to issue two arrest warrants containing charges for, inter alia, persecution, murder, rape and other forms of sexual violence, forcible transfer, pillaging, destruction of property, inhumane acts and torture.

56. The Special Rapporteur expresses his concern about the lack of cooperation from the Government of the Sudan and the lack of a relationship agreement between the Court and the African Union, a circumstance which seriously hampers the investigations and puts at risk the appearance of the suspects before the judges of the Court.

3. Uganda

57. On 29 July 2004, at the request of the Government of Uganda, the Prosecutor of the International Criminal Court determined that there was reasonable basis to open an investigation into the crimes allegedly committed in northern Uganda by the leaders of the Lord's Resistance Army (LRA). Following that investigation, and having confirmed the existence of sufficient evidence, on 8 July 2005 Pre-Trial Chamber II issued five warrants of arrest for five LRA leaders charged with crimes against humanity and war crimes.

58. The Special Rapporteur expresses concern that, more than two years after the issuance of the warrants of arrest, none of the five suspects have been detained or surrendered to the Court.

59. On 29 June 2007, the Government of Uganda and LRA signed the third phase of a peace agreement, pursuant to which they agreed to establish a commission to investigate the potential war crimes allegedly committed by both sides and to adopt of a procedure, in keeping with tribal customs, to deal with rebels accused of war crimes. However, as a prerequisite for the signature of a comprehensive peace agreement, the senior leaders of LRA have called on the Government of Uganda to ask the International Criminal Court to withdraw the arrest warrants it had issued. In that connection, the Prosecutor of the Court noted that, while no formal request to that effect had been made, "peace and justice should continue to be viewed as mutually reinforcing objectives".[2] The Special Rapporteur draws the attention of the Government of Uganda and LRA to the need to reach an agreement that precludes any type of amnesty for war crimes, crimes against humanity, genocide and grave violations of human rights, thereby striking a balance between the need to see justice done and the need to achieve lasting peace in the region.

4. Central African Republic

60. On 22 May 2007, the Prosecutor of the International Criminal Court announced his decision to open an investigation in the Central African Republic, at the request of the country's Government, into alleged crimes committed during the most violent period of the armed conflict between the Government and the rebel forces in 2002 and 2003. The Court of Cassation — the country's court of highest instance — subsequently confirmed that the national justice system was unable to carry out the proceedings necessary to investigate and prosecute the alleged war crimes and crimes against humanity, thereby enabling the International Criminal Court to hear the case in accordance with the principle of complementarity. This is the first time that the Court has opened an investigation in which allegations of sexual crimes — committed specifically against women — outnumber alleged killings.

B. Iraqi Supreme Criminal Tribunal

61. The Special Rapporteur has followed from the outset the establishment and activities of the Iraqi Supreme Criminal Tribunal and, in a number of reports and press releases, has pointed to the serious irregularities characterizing its establishment and functioning. With regard to its establishment, although the Statute

[2] See document entitled "Submission of information on the status of the execution of the warrants of arrest in the situation in Uganda", ICC-02/04-01/05-166-Corr.2, dated 6 October 2006.

adopted by the Coalition Provisional Authority was subsequently endorsed by the Government Council and thereafter by the elected Iraqi authorities, this does not resolve the original problem identified by the Special Rapporteur in his previous reports. Moreover, in many respects the Tribunal's Statute does not comply with international human rights standards: for example, it provides for limited personal jurisdiction, which allows the Tribunal to judge only Iraqis, and limited jurisdiction *ratione temporis*, since the Tribunal cannot judge crimes committed by foreign forces prior to the 1990 Gulf war or war crimes committed since 1 May 2003, the date on which Iraq was occupied. In addition, the Statute does not rule out confessions obtained as a result of torture or arbitrary detention, includes as offences acts which were defined as such only after their commission by Saddam Hussein's regime, and does not protect the right not to testify against oneself.

62. The independence of judges and lawyers is not guaranteed, as evidenced by the trial relating to the Dujail massacre, in respect of which Saddam Hussein and other accused individuals were sentenced to death and executed. One judge, several proposed judges, three defence lawyers and a court employee were assassinated during this trial. Another judge resigned as President of the Tribunal after having been subjected to pressure on account of his former links with the Ba'ath regime. Above and beyond the current widespread condemnation of the death penalty, the Human Rights Committee has repeatedly stated that, in accordance with the International Covenant on Civil and Political Rights, the death penalty can be applied only when all the guarantees of due process, set out in article 14 of the Covenant, are respected. In the trial held in the wake of the Dujail massacre, those guarantees were violated, and thus there were also violations of the right to a fair trial and the right not to be arbitrarily deprived of one's life.

63. Similar concerns regarding serious violations of international human rights standards were also expressed by the High Commissioner,[3] the Working Group on Arbitrary Detention,[4] the Special Rapporteur on extrajudicial, summary or arbitrary executions[5] and various international human rights NGOs.

Death penalty and the right to the truth

64. The Special Rapporteur notes with serious concern that individuals sentenced to death are still being executed in Iraq, despite his repeated requests and those of other United Nations bodies that such executions should be discontinued. Furthermore, in the case of Iraq the implementation of the death penalty has engendered a serious violation of the right to the truth of the victims of the crimes committed by Saddam Hussein's regime.

65. The Special Rapporteur is also extremely concerned about the circumstances surrounding the execution of Awraz Abdel Aziz Mahmoud Sa'eed on 3 July, which went ahead in spite the fact that he had specifically requested its cancellation on account of the fact that Awraz Abdel Aziz Mahmoud Sa'eed had confessed to having participated in the attack of August 2003 against the United Nations office in Baghdad. In the specific case of Awraz Abdel Aziz Mahmoud Sa'eed, the execution

[3] *Amicus curiae* dated 8 February 2007 and press releases dated 5 November 2006 and 3 and 15 January 2007.

[4] Opinion No. 31/2006 dated 1 September 2006 and press releases dated 28 November 2006 and 24 January 2007.

[5] A/HRC/4/20/Add.1 and press releases dated 16 November 2005, 3 January 2007 and 13 February 2007.

also violated the right to the truth of the victims of the attack against the United Nations office in Baghdad and frustrated attempts to obtain significant evidence relating to the tragic attack that cost 22 people their lives, including Sergio Vieira de Mello, United Nations High Commissioner for Human Rights and Special Representative of the Secretary-General.

C. Extraordinary Chambers in Cambodia

66. In his 2006 report to the General Assembly, the Special Rapporteur noted with satisfaction that the Extraordinary Chambers in Cambodia had been established and, with the swearing-in of the national and international judges on 3 July 2006, had begun their work. At the present time, he wishes to draw attention to the unanimous adoption, on 12 June 2007, of the Internal Rules by the plenary session of national and international judges, thereby concluding a two-week session in Phnom Penh. In a joint statement, the national and international judges emphasized their commitment to completing the trials in a timely manner while ensuring respect for the highest standards of justice, impartiality and transparency.[6]

VIII. Conclusions and recommendations

67. **The Special Rapporteur invites the General Assembly to increase its efforts to defend the work being accomplished by different actors involved in the administration of justice and to consider problems affecting the judicial system and its independence, with a view to recommending that States should adopt specific measures intended to guarantee to judicial employees the safety and protection they require to perform their duties properly.**

68. **Bearing in mind that the administration of justice is one of the pillars of the rule of law and the democratic system, the defence of justice must be accorded priority when analysing the institutional aspects encompassed by the activities of the United Nations as a whole. In this context, the Organization should, in its support and technical cooperation activities, promote the theme of justice, especially with respect to countries which are in transition or are recovering from an armed conflict which has had a serious impact on nation-building.**

69. **States should immediately bring their domestic legislation and practices into line with international principles, judicial practice and standards governing the protection of human rights during states of emergency. In this regard, the Special Rapporteur is convinced that the expert seminar to be held by OHCHR before the end of 2007 will provide very useful input to the process by drafting a declaration containing the basic principles designed to ensure the observance of human rights during states of emergency.**

70. **Bearing in mind that access to justice is one of the prerequisites for the effective enjoyment of the most basic human rights, and that the Special Rapporteur has found that this is one of the most common problems in many**

[6] The Special Rapporteur also welcomes the reduction from $2,000 to $500 of the registration fee for foreign lawyers levied by the Cambodian Bar Council, since the legitimate objections to the fee expressed by international lawyers served to delay the adoption of the Internal Rules.

countries, he intends to address the issue in an extensive manner in his next general report to the Human Rights Council.

71. **The Special Rapporteur urges the international community to support the work of the International Criminal Court by ratifying its Statute and signing cooperation agreements in order to ensure that the perpetrators of perverse crimes, such as war crimes, crimes against humanity and acts of genocide, are brought to justice and no longer go unpunished. In this connection, he encourages, in particular, the African Union to sign a relationship agreement with the Court.**

72. **With regard to the Iraqi Supreme Criminal Tribunal, the Special Rapporteur reiterates his previous recommendations, in particular that trials be conducted in accordance with international standards or that an international criminal tribunal be constituted with the cooperation of the United Nations.**

73. **With regard to the Extraordinary Chambers in Cambodia, the Special Rapporteur welcomes the favourable resolution of the issues surrounding the fees of international lawyers and the adoption of the Internal Rules. He now urges the Office of the Prosecutor to open its investigations in the forthcoming weeks so that the first hearings can begin in the first quarter of 2008, as envisaged by the national and international judges in their joint declaration of 12 June 2007.**